(3)

No. 94-1671

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DEBORAH QUICK SCALES,

Petitioner,

v.

THE GEORGE WASHINGTON UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals sustaining the trial court's resolution of petitioner's legal claims conflicts with the decision in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990).

2. Whether the trial judge violated 28 U.S.C. § 455(a) and the decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) by presiding over the trial.

3. Whether the petitioner was "fully heard" at trial within the meaning of Federal Rule of Civil Procedure 52(c).

PARTIES BELOW

The parties are correctly stated in the petition.*

*Respondent is unaware of any parent or subsidiary of the corporation that is a party to this proceeding.

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No. 94-1671

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1994

DEBORAH QUICK SCALES,

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BRIEF IN OPPOSITION

OPINIONS BELOW

Deborah Quick Scales, ("Scales"), filed suit against The George Washington University, ("GW" or "University"), on March 27, 1989, seeking declaratory and injunctive relief and $29 million in compensatory and punitive damages. Her complaint contained nine separate counts.

By Order dated March 25, 1991, the trial court granted partial summary judgment to the University and dismissed all of

Scales' claims except disparate treatment and retaliation[1] arising under Title VII.

By Order dated November 18, 1991,[2] the trial court reinstated the fraud claim,[3] but, after reexamining the merits of each, declined to reinstate any other claim dismissed in March. By Order dated August 21, 1992, the trial court, however, granted GW's renewed motion for partial summary judgment and dismissed Scales' fraud claim on the merits. Scales sought reconsideration again, but the trial court refused by its Order dated February 9, 1993, to reinstate the Title VII disparate impact claim, the 42 U.S.C. §1981 claims or the fraud claim.

On April 19, 1993, a bench trial, with an advisory jury

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[1] Although Scales requested the Court of Appeals to reverse and remand for new trial the district court judgment, she did not address her Title VII retaliation claim or attempt to show any error on the part of the trial court in dismissing that claim. Jul. 27th Sl. op. at 30-32.

[2] Petitioner's attempt at complying with Supreme Court Rule 33 has resulted in an Appendix that materially misstates and misquotes the trial court's rationale for its decisions. Rather than faithfully reproducing the district court memoranda, her Appendix contains text replete with errors ranging from misspellings and wrong citations to substantial omissions. As a blatant example that illustrates a very substantial omission, compare Petitioner's Appendix at 42, lines 2 and 3 -- where she has deleted almost two hundred words of text from Judge Oberdorfer's November 18, 1991, Memorandum -- with the Westlaw database at 1991 WL 257975 * 4 (D.D.C.).

[3] Since Scales' complaint alleged diversity of citizenship, her local claims were not pendant and the lower court thus lacked discretion to dismiss them. Confusion ensued on that issue because GW moved to dismiss the common law counts on the theory that they were pendant, Scales failed to raise diversity in her opposition and the district court did not refer *sua sponte* to Scales' complaint. *Cf.* Nov. 18th Sl. op. at 3-4. In a motion to reconsider the March 25th ruling, Scales finally raised the point with the trial court that she had asserted diversity jurisdiction in her complaint, and the judge acted accordingly.

impaneled,[4] commenced on the merits of Scales' Title VII disparate treatment and retaliation claims. At the close of Scales' case, the trial court granted GW's motion for judgment pursuant to Fed. R. Civ. P. 52(c). Scales appealed the district court's decisions on August 18, 1993. She sought summary reversal alleging for the first time that the trial judge had abused his discretion by not disqualifying himself pursuant to 28 U.S.C. § 455. After considering the issue raised for the first time on appeal, the motions panel of the D.C. Circuit denied the motion on January 4, 1994. The case was briefed, and then fully argued on November 14, 1994. Two weeks later, after determining that the issues Scales presented on appeal occasioned no need for an opinion, the Court Appeals affirmed, *per curiam*, on November 28, 1994, all of the orders and judgments of the district court. *Scales v. George Washington University*, 44 F.3d 1031, 1994 WL 709334 (D.C. Cir.). Scales then petitioned for rehearing and suggested rehearing *in banc*. By *per curiam* orders entered January 17, 1995, the Court of Appeals for the District of Columbia Circuit denied Scales' petition and suggestion. *Id.*

COUNTER STATEMENT OF THE CASE

In her "Statement of the Case," Scales points to an inadmissible hearsay statement that GW supposedly has "an understructure of black underpaid workers . . .," (Petition For Writ of Certiorari, ("Cert. Pet."), at 5), in a January 1987 Report, (Petitioner's Appendix, ("Pet. App."), pp. 311-313), that was admitted "not for the truth of the matter asserted, but to show [GW's] knowledge of the document," (Jul. 27th Sl. op. at 13 n.12), as evidence of possible pretext. Tr. dtd. Apr. 26th at 57-58. In fact, Scales' counsel conceded at trial that he was *not*

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[4] This Court had not yet ruled that provisions of the 1991 Civil Rights Act did not apply to cases that arose before its enactment, although the D.C. Circuit had in *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992). The trial court dismissed the advisory jury after it had become hopelessly tainted by Dr. Work's incompetent "expert" testimony. Tr. dtd. Apr. 21st at 12-14.

offering the statement "as proof that [GW has] an understructure of black underpaid workers and that racial separation on the basis of jobs is extremely strong," (tr. dtd. Apr. 26th at 56), yet he is offering it for the truth to this Court.

The trial court properly credited uncontroverted testimony by University officials, (tr. dtd. Apr. 30th at 9-29 through 9-31), elicited by Scales, that GW "engaged in efforts to recruit blacks prior to the issuance of the 1987 report, [and] intensified its recruitment efforts after issuance of the report." Jul. 27th Sl. op. at 13 n.12. Indeed, GW's Director of Nursing testified to Scales' counsel's questions that after the report, GW intensified its earlier efforts by engaging a firm to bolster recruitment of black professionals (tr. dtd. Apr. 30th at 9-30 through 9-31), developing an advertising campaign to increase GW's visibility at historically black colleges, (*id.* at 9-31), advertising on black radio, reworking its nursing brochure, and consulting with black nurses on how better to recruit their colleagues. *Id.*

Scales conveniently omits the significant fact that for ten years an *African American* held the Head Nurse job to which Scales claims she is entitled.[5] *Cf.* Cert. Pet. at 2. Not only does this fact eviscerate Scales' bald contention that GW "segregates jobs on racial lines" in a "work force structure [of] 'white top and minority (black) bottom'" (Cert. Pet. at 4), but it belies Scales' claim that race factored anywhere in the promotion denial.

On December 11, 1986, Joan Michaels, ("Michaels"), was

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[5] In 1985, a Nursing Unit Coordinator ("NUC") job became vacant in GW's acute medicine unit known as "5-South," upon the departure of Edna Hamilton, the African American female incumbent who held that position for a decade. Jul. 27th Sl. op. at 3. That position was equivalent to Head Nurse for a unit of the hospital.

offered the NUC position for 5-South.[6] Jul. 27th Sl. op. at 4, 6. Michaels was the best qualified candidate. *Id.* at 6. Scales fails to state that Michaels was one semester short of obtaining her Master of Science in Nursing ("M.S.N.") degree, and she had been a Head Nurse at Sibley Memorial Hospital for three years. *Id.* at 5-6. She also received "rave reviews" from her interviewers, who considered her "dynamite." *Id.* at 5. Scales, on the other hand, had not been admitted into an M.S.N. program and had not received any credits toward the Master's degree.[7] *Id.* at 5. Although she had been an Assistant Nurse Coordinator, ("ANC"), for almost 5 years, Scales had served as Acting NUC for only a few weeks. *Id.* at 4. Finally, Scales' interviewers were "lukewarm" about her interview performance.[8] *Id.* at 5. Michaels, however, declined the position in mid-January 1987. *Id.* at 6.

The vacancy was readvertised in early 1987 due to: (1) GW's desire to consider more than one qualified applicant; (2) GW's belief that the candidate selected to become NUC for 5-South must perform well in the interview, and demonstrate effective communication skills; and (3) GW's concern, after observing Scales' performance as Acting NUC, that her

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[6] Scales' claim of preselection is wholly unfounded. Cert. Pet. at 2. The trial court after objection, properly struck from the record as impermissible hearsay, Gina Brooks' statement "that Michaels told her during her interview that she (Michaels) had been offered the position of NUC for 5-South." Jul. 27th Sl. Op. at 6 n.5 and 29 n.20. Notably, Scales did not deny that the purported out-of-court statement was offered for the truth; she did not point to any exception to the hearsay rule that might arguably cure the hearsay taint; and, Scales did not assert that the trial court erred by sustaining GW's objection. Tr. dtd. Apr. 30th at 12.

[7] Scales' reference to having obtained the M.S.N. degree in 1991, (Cert. Pet. at 1), is completely irrelevant to this case except perhaps as a concession that the M.S.N. degree is an important credential for the head nurse job.

[8] The trial court correctly dismissed as "unreliable as well as irrelevant," Scales' *ipse dixit* "assertion that she performed very well during her interviews." Jul. 27th Sl. op. at 5 n.4.

communication skills were less than they should be, as Head Nurse of the largest and most challenging nursing unit in the University's Medical Center. Jul. 27th Sl. op. at 6-7.

In April 1987, Ann Cooley Pierpont, ("Cooley"), was offered the NUC position for 5-South. Jul. 27th Sl. op. at 9. Again, GW selected the best qualified candidate. *Id.* at 9. Scales fails to mention that Cooley had been awarded the M.S.N. degree in nursing administration, and had also obtained a medical-surgical certification that Scales did not have. *Id.* at 8. Moreover, Cooley had been a Head Nurse at the National Rehabilitation Hospital ("NRH") for the past two years, in addition to having held an ANC position at GW several years earlier. *Id.* Cooley even started a new nursing unit at NRH. *Id.* Additionally, Cooley had been recommended by all of those who had interviewed her on March 13, 1987, except one. *Id.* GW considered Cooley's interview performance to be substantially superior to Scales'. *Id.* In addition to Cooley's superior education, experience and interview performance, GW considered Scales' four-month performance as Acting NUC for 5-South to be less than fully satisfactory. *Id.* at 8-9. Cooley began working on May 19, 1987, as the new NUC for 5-South. *Id.* at 10.

REASONS FOR DENYING THE WRIT

A. THE DISTRICT COURT'S DECISION TO AWARD JUDGMENT PURSUANT TO FED. R. CIV. P. 52(c) IN FAVOR OF THE UNIVERSITY WAS UNQUESTIONABLY CORRECT.

Summary of Argument

In the context of this record, which conclusively shows that petitioner was undermined by her own misguided trial tactics, the very uniqueness of this case, turning as it does on its own special facts, precludes review by this Court.

At trial, Scales was given a full and fair opportunity to present all relevant evidence and arguments to the district court. After hearing all of her case, the district court reasoned that Scales had "adduced evidence from the direct and cross-examination of witnesses who she called that supports [the University's] position that the reasons were not pretextual, but were legitimate and nondiscriminatory." Jul. 27th Sl. op. at 19 and 24-25. Given that Scales advanced GW's legitimate, non-discriminatory explanation by calling and questioning GW officials as hostile witnesses in her case, then tried to prove it pretextual, but "[t]he district court did not find [Scales] rebuttal persuasive, and [Scales] did not suggest that [s]he had further evidence on point," *Mitchell v. Baldrige*, 759 F.2d 80, 88 (D.C. Cir. 1985), the district court quite properly "decide[d] the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [her]' because of [her race]." (Citation omitted). *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S.Ct. 2742, 2749 (1993) (Scales had to prove "*both* that [GW's] reason was false, *and* that discrimination was the real reason," *id.*, 113 S.Ct. at 2752).

The district court also properly concluded that Scales' statistical evidence and her statistical expert were utterly incompetent.

1. Scales' Assertion That She Was Not "Fully Heard" Is Unfounded.

Scales claimed, for the first time on appeal,[9] that because the trial judge remarked that he "probably wouldn't grant [GW's Rule 52(c)] motion anyway," (tr. dtd. Apr. 22nd at 93), her right to be fully heard was substantially compromised. Cert. Pet. at 12,

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[9] Arguments not made below are deemed waived, *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 163-164 (1975), and, absent "exceptional circumstances" not present here, "it is not [the Court of Appeals] practice to entertain issues first raised on appeal." *Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 419 & n.5 (D.C. Cir. 1992).

60. In the district court, however, Scales was so satisfied that she had carried her ultimate burden of proving intentional discrimination and retaliation at the close of *her* case that she orally "move[d] for judgment on the record on both counts in [her favor]," (tr. dtd. May 5th at 12-89), and reaffirmed her dubious demand for judgment in proposed findings of fact and conclusions of law filed with the trial court.

Now Scales contends that because of the judge's remark, she "completely restrategized and restructured her case-in-chief" by reserving "[k]ey witnesses" for rebuttal and "refashion[ing]" her interrogation of "hostile witnesses" during her case-in-chief. Cert. Pet. at 12, 60. Scales' assertion is entirely disingenuous, since she finished examining GW's principal decisionmaker *before* the colloquy. Moreover, her "risky," (Jul. 27th Sl. op. at 24 n.15), case strategy was unaltered from the beginning. As the trial court noted,

> [p]laintiff chose to proceed by calling the decisionmakers in her case-in-chief and eliciting from them the reasons for the disputed decisions. Thus, [GW's] legitimate nondiscriminatory reasons for the decisions were presented during *plaintiff's* case. Plaintiff then attempted, in her case, to show that those reasons were pretextual.

July 27th Sl. op. at 24.

Deliberately, Scales persisted in that fashion from the very beginning "despite strong urging by the Court during two pretrial conferences that the trial should proceed in the order established by *McDonnell Douglas's* indirect method of proof." *Id.* at 24 n.15. Throughout the trial, the Court continued to caution Scales about putting GW's reasons for its decisions on the record in her

case.[10] For instance, Scales understood that GW's Director of Nursing was "a hostile witness" and would offer reasons for rejecting Scales, (tr. dtd. Apr. 26th at 64), yet she insisted on calling the GW official despite the trial judge's contrary urging.

> It would be so much better if you [GW] put her [GW official] on with her explanation and then you [Scales] cross-examine her. I have told you [Scales] that forty times. But you [Scales] are going to put her on.

Tr. dtd. Apr. 26th at 65. The trial judge went on to counsel that, "[t]he burden the plaintiff has is to produce evidence. It's not to force confessions from hostile witnesses." Tr. dtd. Apr. 29th at 35.

But Scales was undeterred, and predictably "the witnesses did not confess to discrimination on the basis of race, nor did they make any material contradictions." Jul. 27th Sl. op. at 24 n.15. As those hostile witnesses, in responding to Scales' interrogation, proceeded to "explain their nondiscriminatory reasons for not selecting [Scales] for the NUC position," (*id.*), the trial judge continued to urge caution: "why do you [Scales] want to torpedo whatever evidence you have?" Tr. dtd. Apr. 29th at 26. As Scales tried to refresh a GW official's recollection on a point, for example, the trial court interceded and inquired,

> [n]ow, why do you want to prove that [Scales was insensitive to subordinates]? That's very damaging. * * * What are you trying to do? *

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[10] In colloquy with the court, Scales' counsel acknowledged that by continuing to question GW's Nursing Director, "she might probably provide an explanation" for her decisions. The court responded: "Well why do you care what her explanation is? You don't expect her to say that it's racially motivated, do you?" Counsel answered "no," (tr. dtd. Apr. 29th at 97), then proceeded with his interrogation to elicit testimony from GW officials "relevant to the ultimate issue." *Id.* at 98.

> * * Why do you want to dig up from [the Nursing Director's] memory a derogatory observation about [Scales]?

Tr. dtd. Apr. 29th at 29-30. Scales ignored the trial court's repeated suggestions and advice and insisted on putting all of GW's explanations on the record. Tr. dtd. Apr. 30th at 13.

Without a doubt, Scales was aware of precisely what GW's nondiscriminatory reasons were beforehand. They were never kept "secret." Jul. 27th Sl. op. at 25 n.17. All of those reasons had been previously disclosed to Scales in discovery and during motions practice. Scales surely anticipated that they would be advanced when she called hostile witnesses, and the testimony was as expected. Even before Scales accomplished what she set out to do in that regard, she acknowledged:

> We have the burden of proving pretext. We view that the reasons given for the denial of promotion for Scales are pretextual. . . .

Tr. dtd. Apr. 26th at 63. Accordingly, as the trial proceeded, the judge deliberately undertook "to make sure that the record included whatever it is that [Scales] thinks [is] evidence [of] pretext." *Id.* at 57-58. And Scales has conceded that she "'offered her evidence of pretext during her case in chief.'" Jul. 27th Sl. op. at 24 n.15, *citing* Scales' proposed findings and conclusions at 39. Thus, Scales' claim that she left room for discrediting those officials during their expected testimony for the defendant, (Cert. Pet. at 60), rings exceedingly hollow, as does her argument that by granting GW's motion after saying he "probably wouldn't," (*id.*), the trial judge somehow abused his discretion.

"It is clear from the cases that a Rule [52(c)] denial is tentative and does not constrain the court's ultimate disposition of the case." *Sanders v. General Services Admin.*, 707 F.2d 969, 972 (7th Cir. 1983). Courts have approved the granting of such

motions at the close of a "'full blown' trial," and even upon reconsideration "sometime between the end of plaintiff's case and the end of the trial," after being initially denied. *Id.* (citations omitted).

> If plaintiff has not set forth evidence of discrimination and there is nothing aside from general assertions of discrimination for defendant to rebut, no purpose is served by requiring defendant to go through the motions -- at no small cost in time and expense to the parties and the court. Plaintiff has no entitlement to a full dress trial regardless of the plausibility of her claim.
>
> * * *
>
> If we refused to allow reconsiderations . . . we would be denying the district court an element of its discretion to handle cases as it thinks best.

Id. at 973. In this case, Scales' "nonselection was because she was less qualified than the other applicants." Jul. 27th Sl. op. at 26 n.17. The trial judge's plainly tentative comment about what he would "probably" do "does not constrain the court's ultimate disposition of the case" any more than had GW's motion actually been denied, and then granted later. *Sanders v. General Services Admin.*, 707 F.2d at 972-973.

This Court should thus disregard Scales' attempt to focus blame elsewhere for her failed trial strategy, particularly since she had the opportunity to move to reopen the case under Fed. R. Civ. P. 60(b) if she sincerely felt her case of pretext remained undeveloped, but failed to do so. *Cf. Mitchell v. Baldrige*, 759 F.2d at 89 (because "plaintiff asked to reopen his case-in-chief so that he could rebut the nondiscriminatory explanation . . . [and] the district court" denied the request, the case was remanded).

2. Scales Is Mistaken In Stating That The Trial Court Relied On GW's Witness In Its Ruling.

Scales next maintains that the district court relied on the testimony of Dr. Saberhagen, GW's statistical expert, taken "out-of-turn,"[11] to rebut her statistical expert. Cert. Pet. at 62-63.

The trial court in this case purposefully isolated any testimony of witnesses called out-of-turn by GW in accordance with Scales' stipulation "that by isolating defendant's direct exam, it is without prejudice to defendant's motion for judgment at the completion of plaintiff's case." Tr. dtd. Apr. 29th at 133-134.

Moreover, the trial judge is knowledgeable of statistical principles in his own right, as evidenced by the following colloquy with counsel for GW:

> *Counsel*: I do not know how [much] understanding your honor [has of statistics].
> *Court*. It's considerable. I haven't been here for 15 years and in private practice for 45 for nothing.
> *Counsel*: Your Honor, I've taken statistics and I'm still very much in the dark.
> *Court*: Well, I'm not in the dark.

Tr. dtd. Apr. 22nd at 92. In pointing out the failings and "deficiencies in Dr. Work's analysis," the trial court relied on its own considerable understanding of statistical principles to conclude that there was no "uniform pool of data," that the "sample size

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[11] Scales admits that she "agreed[] to have . . . defense experts testify out-of-turn during her case in chief." Cert. Pet. at 11.

[was] too small to yield scientifically reliable conclusions,"[12] and that there were other substantial analytical defects, as well as the authority of "scholarly publications" of which it properly took judicial notice. Jul. 27th Sl. op. at 27 n.18. There is simply "no reason to question the judge's assertion." *Sanders v. General Services Admin.*, 707 F.2d at 973.

3. The Trial Court Properly Rejected Scales' Statistical Evidence.

Scales sought to introduce statistical evidence "intended to demonstrate a racial imbalance" in GW's Hospital workforce. Jul. 27th Sl. op. at 16. However, Scales' statistical evidence regarding the racial composition of the Hospital's entire workforce failed because "only individuals with the *relevant qualifications* may provide the basis for a comparison that is probative of discrimination," among other reasons. *Id.* at 17. *Cf. Wards Cove Packing Co. Inc. v. Atonio*, 490 U.S. 642, 651-652 (1989) (finding it "nonsensical" to measure "alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers . . . by comparing" minority representation in unskilled cannery positions); *Hammon v. Barry*, 813 F.2d 412, 427 n.31 (D.C. Cir. 1987) *citing Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977)("when the job qualifications involved are ones that relatively few possess, statistical presentations that fail to focus on those qualifications do not have significant probative value").

Since Dr. Work admitted, *inter alia*,: (1) that to be a staff nurse at GW, the RN license is required, (tr. dtd. Apr. 20th at 70); (2) but that he included for comparative purposes, people in

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[12] Tiny sample size is an obvious defect. *Cf. International Bro. of Teamsters v. United States*, 431 U.S. 324, 340-341 n.20 (1977) ("Considerations such as small sample size may, of course, detract from the value" of statistical evidence); *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir. 1994)("plaintiff's data. . .simply involved too small a sample size to have any probative value here").

positions that did not have the RN job requirement, (*id.* at 70-71); and (3) that he was not aware of whether people who were represented in his analysis were qualified to be NUC's, or whether the M.S.N. credential was beneficial for those in Hospital management positions, (*id.* at 81),[13] the trial court concluded that Scales simply "failed to show that employees at higher and lower levels in the employment hierarchy possessed qualifications and experience sufficiently similar to the NUC position to justify comparison." Jul. 27th Sl. op. at 17. Scales' comparison of jobs that "do not require an RN licensure requirement [ ] with positions that do require an RN license is not a relevant comparison." *Id.* The trial court was unquestionably right.

Dr. Work erred again by merging "data for the period 1981 through 1989, rather than focusing on the specific period in question, [*viz.*,] December 1986 through March 1987," (Jul. 27th Sl. op. at 16), and even then, Dr. Work did not know whether minority representation in NUC positions improved during the 1981 through 1989 period he arbitrarily selected. Tr. dtd. Apr. 20th at 80. Tellingly, "individuals were counted multiple times if they held different positions during the surveyed period, further tending to skew the results." Jul. 27th Sl. op. at 17. When asked why he did not correct that defect, Dr. Work conceded, "because that didn't -- it doesn't inter[pret] the picture that we wanted to establish at all."[14] Tr. dtd. Apr. 20th at 78.

Finally, the district court found that Dr. Work used improper population statistics, (*cf. Hammon v. Barry*, 826 F.2d 73, 77 (D.C. Cir. 1987) *reh'g granted in part, en banc*, 833 F.2d 367 (1987), *reh'g vacated* 841 F.2d 426 (1988), *cert. denied*, 486

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[13] At one point, even Dr. Work discredited Scales' counsel's continued belief that an M.S.N. degree is not an appropriate requirement for NUC, by stating "I would not conclude that[,] Mr. Mekbib." Tr. dtd. Apr. 21st at 29.

[14] In straining to arrive at a desired statistical outcome, Dr. Work even included in his comparative analysis the plainly irrelevant fact that Scales obtained an M.S.N. degree in 1991. Tr. dtd. Apr. 20th at 59-60.

U.S. 1038 (1988) (relevant labor market is Washington metropolitan area, not confines of D.C.)), and had misused statistical data and thus deemed his testimony to be hopelessly flawed and incompetent. In short, Dr. Work's analysis was found to be wholly "inaccurate and without genuine probative value." Jul. 27th Sl. op. at 27. The district court concluded that there was no reliable evidence that GW's workforce was intentionally segregated on the basis of race. *Id.* at 13. Despite Scales' attempt to offer reasons for the collapse of this statistical evidence other than its failure to account, *inter alia*, for the requirements of *Hammon v. Barry*, the plain fact remains that Scales voluntarily "withdrew it" from consideration. Jul. 27th sl. op. at 16.

B. THE DISTRICT COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT EARLY IN THE LITIGATION WAS PLAINLY APPROPRIATE AND DOES NOT IMPLICATE *LYTLE V. HOUSEHOLD MANUFACTURING, INC.*, MUCH LESS CONFLICT WITH IT.

Summary of Argument

The question petitioner first presents is not sufficiently vital for this Court to entertain given that the Civil Rights Act of 1991 provides a *new* right to jury trial in Title VII actions, a right that Scales did not have, thereby eliminating in subsequent cases the law/equity dichotomy she raises. *Cf.* fn. 4, *supra*.

Moreover, Scales failed to timely raise the issue. In her petition for rehearing to the Court of Appeals, Scales claimed for the first time that the trial court's dismissal of her §1981 claims violated her constitutional right to a jury trial under the reasoning of *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990). She has thus waived that argument.

Even if she had preserved the argument, the *Lytle* case is inapposite. The reasoning and conclusions of the Court of

Appeals are consistent with harmless error, *not* collateral estoppel. Given the way Scales tried her case, the district court would have directed a verdict in GW's favor on the §1981 claims at the close of her case.

Scales' "suites (sic) at common law," (Cert. Pet. at 19), also lack merit. She failed to advance evidence to sustain essential elements of her fraud claim and even admitted a lack of reliance on GW's supposed representations. The intentional infliction of emotional distress claim was filed too late and GW's actions were not, as a matter of law, "outrageous" or "extreme." Finally, her inability to show discrimination eliminated any possibility of success on her contract claim. In any case, her failure to adduce any contract from which she could benefit left Scales an "at will" employee.

1. Scales' Seventh Amendment Argument Was Not Timely Presented And Is Deemed Waived.

Arguments not timely presented are deemed waived. *See, e.g., Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d at 419 & n.5. Even rights under the Federal Constitution may be waived by failure to assert such errors on appeal. *Cf. Frank v. Mangun*, 237 U.S. 309, 342-343 (1914). This general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing. *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986)(order amending opinion published at 787 F.2d 1318 (9th Cir. 1986), and denying petition for rehearing and rehearing *en banc), cert. denied*, 489 U.S. 1032; *Com. of Northern Mariana Islands v. Lizama*, 27 F.3d 444, 448 (9th Cir. 1994); *United States v. Fogelman*, 592 F.2d 786, 787 (5th Cir. 1979).

In her petition for rehearing in the Court of Appeals, Scales asserted for the first time that the district court's resolution of her discrimination claims "infringes upon her rights preserved by the Federal Constitution's Seventh Amendment and is in conflict with . . . a unanimous decision of the U.S. Supreme

Court."[15] Because she failed to raise this question in her appellate brief or at oral argument,[16] this Court should decline to address it.

In any case, the court below affirmed the district court's decisions on grounds other than a purported collateral estoppel effect of the Title VII judgment. After being fully heard, Scales simply failed to "establish discrimination in her Title VII claim [and s]he therefore could not have succeeded on her [§]1981 claim [or her contract claim]." *Scales*, 44 F.3d 1031, 1994 WL 709334 ** 1. Given the state of her record evidence, the trial court could not, as a matter of law, have submitted the case to a jury; it would have ordered judgment as a matter of law against Scales, just as it did. *Lytle v. Household Manufacturing, Inc.*, is thus inapposite.

2. The Trial Court Was Correct To Dismiss Scales' §1981 Claims.

Scales' §1981 claim is predicated on alleged disparate treatment, which necessitates a showing of intentional discrimination. *See Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 69 (6th Cir. 1985) ("It is well settled that an action based upon 42 U.S.C. §1981 requires the plaintiff to demonstrate that the defendant[] intentionally discriminated against her on the basis of race").

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983), provides that in a Title VII case, when a plaintiff invokes a rebuttable presumption of racial discrimination by making out a *prima facie* case, and the employer articulates

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[15] Scales' constitutional argument relative to dismissal of her common law claims appears for the first time in her petition to this Court.

[16] Scales admits that "[i]n her briefs and oral argument, [she] urged the Court below to reverse the summary dismissals of her Section 1981 and common law claims [only] because the[y] [purportedly] . . . violate the mandates of F. R. Civ. P. Rule 56." Cert. Pet. at 16.

legitimate non-discriminatory reasons for its challenged conduct, the rebuttable presumption drops out and the district court proceeds to resolve "the ultimate factual issue in the case . . . '[whether] the defendant intentionally discriminated against the plaintiff.'" *Id.* at 715, *quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once a Title VII case proceeds to this state, as Scales' case did in her case-in-chief, the Title VII inquiry is thus no different than that required under §1981. Indeed, so duplicative are these claims that even Scales' counsel allowed as how he believed the jury had been impaneled to hear his §1981 claim. Tr. dtd. Apr. 21st at 13-14.[17] In short, the ultimate issue in an employment discrimination case decided under either statute "is always whether the defendant intentionally discriminated against the plaintiff." *McDowell v. Safeway Stores, Inc.*, 753 F.2d 716, 718 (8th Cir. 1985).

Here the district court weighed *all* Scales' trial evidence, including all her evidence of pretext in the context of GW's explanation for its actions, and concluded, after exhaustive explication, that GW did not discriminate against Scales, (Jul. 27th Sl. op. at 30), and did not retaliate against her either. Id. at 32. Had "Scales been allowed to present [her §1981] claims before a jury, the district court would properly have ordered judgment as a matter of law against her," *Sailor v. Hubbell, Inc.*, 4 F.3d 323, 326 (4th Cir. 1993), since to succeed she would have had to make the same showing in support of her §1981 claims as her Title VII claims. In view of Scales' failure to demonstrate that the University's proffered reasons for its allegedly racially discriminatory conduct were a pretext for intentional discrimination, her §1981 claim must fail, as her Title VII claim necessarily did. Any error with respect to the dismissal of Scales' §1981 claim would thus be harmless. *See Hussein v. Oshkosh Motor Truck Company*, 816 F.2d 348, 354 n.6 (7th Cir. 1987); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 221-222 (5th Cir. 1984); *Johnson v. Wolff's Clothiers, Inc.*, 663 F.2d 800, 804

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[17] Scales' §1981 claims had been dismissed more than two years earlier, on March 25, 1991.

(8th Cir. 1981).

In any case, the district court acted appropriately on the merits in dismissing her §1981 claim due to Scales' failure to demonstrate that a change from ANC to NUC overcame the hurdle established by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Scales' "expert," (Cert. Pet. at 28-30), was wholly unqualified to testify as a nursing expert by his own admission. *Cf.* Tr. dtd. Apr. 20th at 54; *see, also*, Work Dep. at 187-188, 260-261. Moreover, the belated affidavit of Dr. Work,[18] whose "expertise" is not nursing, but only "on the racial composition of [GW's] workplace and how that composition came about," (Jul. 27th Sl. op. at 15), suggests at most that a change from ANC to NUC would be a promotion. It did not establish nor could it, that such a change would constitute the requisite "new and distinct relation" with GW. *See Byrd v. Pyle*, 728 F.Supp. 1 (D.D.C. 1989) (Richey, J.)("virtually all promotions involve enhanced responsibilities and increased pay" and not all are sufficiently significant). *See also, Wall v. Trust Co. of Georgia*, 946 F.2d 805 (11th Cir. 1991) (denying relief under *Patterson* for nonpromotion from customer service representative to tax analyst); *Bennun v. Rutgers State Univ.*, 941 F.2d 154 (3rd Cir. 1991)(denying relief for nonpromotion from tenured associate professor to full professor based on application of *Patterson*); *Harrison v. Associates Corp. of North America*, 917 F.2d 195, 198 (5th Cir. 1990)(change from computer operator to lead computer operator does not satisfy the *Patterson* test). Ironically, even Scales' counsel seems to have accepted at trial GW's contention that "the [ANC] effectively does everything that the NUC does." Tr. dtd. Apr. 29th at 84-86.

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[18] Scales filed an *untimely* "supplemental opposition" to GW's motion for partial summary judgment in an effort to introduce Dr. Work's affidavit. The trial court, in an exercise of its sound discretion, disregarded it and the purported "expert testimony of Dr. Work."

Finally, after "[e]valuating the evidence adduced in the light most favorable to [Scales],. . . the record [could not] support a presumption of intent to discriminate," as it must for the Court of Appeals to have considered disturbing the district court's grant of summary judgment. *Clifton Terrace Assoc. v. United Technologies*, 929 F.2d 714, 722 (D.C. Cir. 1991). Even if the Court of Appeals "were to [have] conclude[d] that [Scales] established a *prima facie* case. . . the evidence presented in support of [her] claim of discrimination is consistent with [GW's] proffered reasons" for not promoting her. *Id. Cf.* Jul. 27th Sl. op. at 30 ("she [Scales] adduced evidence supporting [GW's] position that its reasons were legitimate and non-discriminatory"). And, in any event, Scales failed to show that GW's reasons for refusing to promote were pretextual. *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995). *Cf.* Jul. 27th Sl. op. at 30 (Scales "has failed to offer evidence sufficient to show that [GW's] nondiscriminatory reasons for its employment decisions are unworthy of credence, or that those decisions were racially motivated").

3. Dismissal of Scales' Claim of Fraud Was Clearly Warranted.

GW carried its burden of demonstrating that Scales failed to make a showing sufficient to establish the existence of an element essential to her claim of fraud. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986) ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*, 477 U.S. at 323). *See, also, Frito-Lay, Inc.*, 863 F.2d 1029, 1032 (D.C. Cir. 1988).

The gravamen of Scales' claim is that GW falsely represented itself as an EEO/AA employer verbally and in writing resulting in her loss of career advancement. To sustain that claim, Scales had to prove by clear and convincing evidence each of five essential elements: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to deceive, and (5) action taken in reliance on the

representation. *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977), *cert. denied*, 434 U.S. 1034 (1978). The district court properly concluded that Scales failed to show that GW's representation of being an equal opportunity employer was made with knowledge of its falsity or with the intent to deceive, or that the representation was material or relied upon by Scales.

In that last regard, Scales testified at deposition to her understanding[19] that "as a black staff nurse [she] would have to . . . work twice as hard . . . and it was a big problem," (Scales' Dep. at 156) and "that because [she was] black, [she] would have to work harder if [she] wanted a promotion, [she] would have to exceed in [her] evaluation, [she] would have to excel in [her] performance in order to get promotions, or what have you." *Id.* at 57. *Cf.* Aug. 21st Sl. op. at 4-5. Naturally, absent reliance, Scales' fraud claim collapses. *See Hercules & Co. v. Shama Restaurant Corp.*, 566 A.2d 31, 39 n.16 (D.C. App. 1989).

The gist of Scales' challenge to the lower court's ruling is the contention that she contradicted her own admissions at deposition by subsequent affidavits filed not in opposition to GW's motion but in a motion by Scales for reconsideration. Feb. 9th Sl. op. at 5-6. It is well settled that "sham" attempts to contradict deposition testimony by subsequent affidavits cannot create a genuine issue of fact. *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991). *See, also, Mack v. United States*, 814 F.2d 120, 124 (2nd Cir. 1987)("a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment"); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984)(same). As the district court observed, the subsequent affidavits confirm a "belief that discrimination is ubiquitous in our

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[19] Scales' understanding was derived from conversations with her supervisor, Edna Hamilton, (also African American), who was the NUC for 5-South from 1974 through 1984. Scales' Dep. at 20-21. Therefore by "July of 1984, Plaintiff was not acting or forebearing in reliance on [GW's EEO] assertions." Aug. 21st Sl. op. at 4-5.

society which tends to undermine an assertion [of] reliance on GW's EEO representation." Feb. 9th Sl. op. at 6. Since Scales continued to admit that she really did not rely on GW's EEO representation, her fraud claim simply could not be sustained.

4. Scales' Claim of Intentional Infliction of Emotional Distress Was Properly Dismissed As Time-Barred and Unfounded.

The District of Columbia Court of Appeals has held that where a claim for emotional distress is completely intertwined with another claim, the appropriate statute of limitation is that set for the underlying local claim. *Saunders v. Nemati*, 580 A.2d 660, 665-667 (D.C. App. 1990). Although Scales maintains that her emotional distress claim either stands alone as an independent action, or is completely intertwined with her "underlying" fraud claim, it plainly stems from her contention that GW denied her promotion from ANC to NUC in December 1986 and March 1987 because of her race, which forms the actual basis of all the claims she has made.[20] It cannot be gainsaid that Scales' emotional distress claim is anything other than completely intertwined with her discrimination claims.

There is, in the District of Columbia, a local statute that specifically provides protection against the precise unlawful discriminatory practices Scales alleges GW engaged in. *See* District of Columbia Human Rights Act, codified at D.C. Code §§ 1-2501 *et seq*, ("DCHRA"). The statute of limitations established by the DCHRA is one year. D.C. Code § 1-2544; *Prouty v. National R.R. Passenger Corp*, 572 F.Supp. 200 (D.D.C. 1983); *Davis v. Potomac Elec. Power Co.*, 449 A.2d 273 (D.C. App.

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[20] Scales' characterization of the claim is not controlling for purposes of limitation analysis. Rather, courts look to the substantive elements of the alleged cause of action. *See, e.g., Morfessis v. Baum*, 281 F.2d 938 (D.C. Cir. 1960); *Maddox v. Bano*, 422 A.2d 763, 765 (D.C. 1980); *Keltan v. District of Columbia*, 413 A.2d 919 (D.C. 1980).

1982). Since Scales' allegations of emotional distress are inextricably bound up in allegations of discrimination forming the basis for all her myriad claims, her emotional injury claim is necessarily subject, under *Saunders v. Nemati*, to the one-year limitation period governing the local DCHRA, with which it is necessarily intertwined. Given the one-year limitation period, D.C. Code § 1-2544, and the fact that Scales sued four months late, her claim for emotional injury is time-barred.[21] The Court of Appeals thus properly affirmed the trial court's ruling "substantially for the reasons given" in its November 18, 1991 Memorandum Opinion.[22] *Cf. Celotex Corp. v. Catrett*, 477 U.S. at 327 ("We think the Court of Appeals with its superior knowledge of local law is better suited than [this Court is] to make these determinations in the first instance").

5. Scales' Breach of Contract Claim Was Properly Dismissed.

Ineluctably, because she failed to establish discrimination, Scales cannot "succeed in her common law breach of contract claim." *Scales*, 44 F.3d 1031, 1994 WL 709334 ** 1. Moreover, Scales simply failed to properly move into evidence the document dated January 21, 1977, she claims now to be a contract between GW and the federal government from which she can benefit. Cert. Pet. at 31-32. In discovery, the University searched high and low but entirely in vain for that document or any information about it and so advised Scales in responding to Request for Admissions Nos. 136 through 138 propounded in her

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[21] Although there is public policy exception for conduct that offends the DCHRA, *Howard University v. Best*, 484 A.2d 958, 986 (D.C. App. 1984), a contract claim on that theory would be barred as well by the one-year limitation for DCHRA claims. Assuming, *arguendo*, that the intentional infliction claim is not untimely, Scales' allegations are insufficient as a matter of law to constitute a viable tort claim. *See District of Columbia v. Thompson*, 570 A.2d 277 (D.C. App. 1990), *cert. denied*, 60 U.S.L.W. 3342 (1991).

[22] *See* fn. 2, *supra*.

Second Request for Admissions. That so-called contract has never been authenticated or shown to be relevant and is simply not record evidence.[23] *Cf.* Nov. 18th Sl. op. at 5 (Scales "has offered no evidence to support her contention that she was not an at-will employee").

"An employment relation of unspecified indefinite duration is presumptively employment 'at will', terminable by either the employer or the employee with or without cause." *Choat v. TRW, Inc.*, 14 F.3d 74, 76 (D.C. Cir. 1994). "In order to rebut the presumption, the employee must present evidence of a 'clearly expressed' contractual intent on the part of *both* the employer and the employee." *Id.* "In the present case, not only has [Scales] failed to establish such a clearly expressed contractual intent, but the record evidence at summary judgment was wholly inconsistent with [Scales] proposition and supportive of the presumption." *Id.*

C. SCALES UNREASONABLY QUESTIONED THE IMPARTIALITY OF THE TRIAL JUDGE.

Summary of Argument

Upon being advised by Judge Oberdorfer that he had been a patient at GW Hospital years before, Scales' counsel responded with an express waiver: "Well, your honor, that wouldn't concern me . . . ." Pet. App. at 149. Scales' failure thereafter to file a disqualification motion sometime during trial, or even afterward in a motion for reconsideration likewise constitutes a bar. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988) (judgment will not be disturbed if plaintiff "did not make a timely request for relief"). Any recusal error, moreover, would be harmless. *Id.*, 486 U.S. at 862 ("there is surely room for

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[23] As Petitioner puts it, "[b]oth in her [appellate] brief and oral argument, Scales . . . sustained the . . . legal theory." Cert. Pet. at 32. She failed, however, to get it in the district court record, much less "sustain" it at the trial level.

harmless error" even in disqualifying circumstances).

1. Scales Failed To Preserve The Right To Attack The Trial Court's Partiality.

As in much of the rest of her case, Scales failed to preserve the issues raised for the first time in her motion for summary reversal filed in the Court below. Indeed "a party having information that raises a possible ground for disqualification can[not] wait until after an unfavorable judgment" to complain. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992). Failure to file a disqualification motion sometime during trial, or even afterward in a motion for reconsideration, constitutes a bar to challenge a judge's impartiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 863, 868 ("Section 455 does not, on its own, authorize the reopening of closed litigation" * * * It is inappropriate to vacate a judgment if "it can be said that [petitioner] did not make a timely request for relief" under Fed. R. Civ. P. 60(b)). *See also, Lunde v. Helms*, 29 F.3d 367, 370 (8th Cir. 1994) ("As a preliminary matter, we note that the district court could have denied the motion to recuse as untimely filed"); *United States v. McCord*, 509 F.2d 334, 346 n. 33 (D.C. Cir. 1974), *cert. denied* 421 U.S. 930 (1975)(Appellant "made timely objections at trial to certain actions of trial judge and made a more general motion directed to recusal . . . . The issue has thus been preserved for appeal"); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3553, at 658 n.17 (2d ed. 1984)(citing cases).

"[B]y his silence" in *Liljeberg v. Health Services Acquisition Corp.*, "Judge Collins deprived [plaintiff] of a basis for making a timely motion for a new trial." *Id.*, 486 U.S. at 867. Nonetheless, the *Liljeberg* plaintiff filed a "motion to vacate" pursuant to Fed. R. Civ. P. 60(b)(6) "as promptly as possible." *Id.*, 486 U.S. at 852. Here, in response to being advised at the beginning of trial of Judge Oberdorfer's earlier hospitalization, Ms. Scales' counsel remarked that the disclosure did not

"concern" him. Pet. App. at 149.

In this case, "the trial judge raised the possibility of disqualification himself at the very beginning. Before trial began, he gave a full and fair disclosure of his situation. . . ." *Delesdernier v. Porterie*, 666 F.2d 116, 122 (5th Cir. 1982), *cert. denied*, 459 U.S. 839 (1982). In this case, just as in *Delesdernier v. Porterie*, "it cannot be seriously argued that [Ms. Scales or her counsel] were unaware before trial began of facts which might arguably support a § 455 motion for disqualification." *Id.*, 666 F.2d at 122. And in this case, just as in *Delesdernier v. Porterie*, "the motion raised for the first time on appeal, and after [a] full trial[] on the merits, is too tardily made for" this Court to consider it now. *Id.*, 666 F.2d at 122-123.

2. Scales' Baseless Speculation Does Not Require Disqualification.

Even if Scales had preserved the claim of partiality, her charge of bias necessarily fails. Although Scales complains of pretrial decisions that resulted in dismissal of the bulk of her claims which she now attributes to disabling prejudice, it is clear that a judge's adverse rulings in and of themselves cannot amount to an assertion of personal bias or prejudice sufficient to justify recusal. There is simply nothing in the record that suggests anything but an abundantly fair and impartial proceeding below.

Without any factual basis whatsoever, Scales now contends that retrial is appropriate "in view of the relationship [Judge Oberdorfer] formed and maintained with defendant's hospital for over a period of three years." Cert. Pet. at 54. There is no evidence that the trial judge formed any relationship with GW at all, much less maintained one for three years. Even in considering a timely motion, rumor, beliefs, conclusions, speculation and opinion are simply not sufficient to form the basis for disqualification of a judge. *See, e.g., United States v. Burger*, 773 F. Supp. 289 (D.Kan. 1991).

"The district judge in this case was, of course, intimately familiar with the record and knew as a matter of fact" that his impartiality could not be reasonably questioned. *United States v. Pollard*, 959 F.2d 1011, 1031 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 322 (1992). It has been observed that "[o]nly the individual judge knows fully his own thoughts and feelings and the complete context of facts alleged.'" *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), (citation omitted). Indeed, "[r]ecusal is a highly personal decision * * * This is not a decision that an appellate panel may make for a district court judge in the first instance." *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1301 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1988).

The record is notably devoid of any evidence that the alleged extrajudicial contacts infected the proceedings. Ms. Scales was provided every opportunity to present her claims and evidence. Judge Oberdorfer repeatedly reconsidered his decisions when asked, and was extravagantly lenient in allowing Ms. Scales' attorney every conceivable opportunity to prove his case at trial. Given the acknowledged length and complexity of the proceedings in the district court, the number of hearings held and the nature of Judge Oberdorfer's remarks, the Court of Appeal's resolution of Scales' contentions was unquestionably correct.

3. Any Error Ascribable to Judge Oberdorfer's Continuing to Sit Would Be "Harmless Error."

Even if this Court could conclude that a Section 455 violation occurred, reversal is not automatic. As with other areas of the law, the "harmless error" rule applies to a breach of a judge's duty to stand down under Section 455. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990), *citing, Liljeberg v. Health Services Corp.*, 486 U.S. at 861-862.

In due course of Scales' appeal, there was a *de novo* review of Judge Oberdorfer's orders granting summary judgment

and the final judgment entered at the close of Scales' trial evidence. It is well settled that "failure to disqualify. . . may be harmless error when a court of appeals will later review a ruling on a plenary basis." *In re School Asbestos Litigation*, 977 F.2d 764, 786 (3rd Cir. 1992) *citing Parker v. Connors Steel Co.*, 855 F.2d 1510, 1526-1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (summary judgment ruling); *In re Continental Airlines Corp.*, 901 F.2d at 1263 (same); *United States v. Vespe*, 868 F.2d 1328, 1342 (3d Cir. 1989) (dictum that if district court had abused its discretion in refusing to disqualify, the error would have been harmless because plenary review applied to ruling on motion for judgment notwithstanding verdict).

CONCLUSION

The trial court did not err in continuing to sit or in granting the University's motions for partial summary judgment or in awarding judgment to GW after Scales' Title VII claims were tried to the court. For the foregoing reasons, the George Washington University respectfully submits that *certiorari* should not be granted because the petitioner presents no issue appropriate for this Court's review.

Dated: May 1995

Respectfully submitted,

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APPENDIX

APPENDIX - PERTINENT STATUTE

The District of Columbia Human Rights Act, codified at D.C. Code § 1-2501 et seq., specifically provides that:

> (a) It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, [or] color . . . of any individual:
>
> > (1) to fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee.

D.C. Code § 2512(a). The act further provides that:

> (b) It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the race, [or] color . . . of any individual.